IN THE HIGH COURT OF BOMBAY AT GOA

Civil Revision Application No.117/2002

M/s. Dhal Construction Company
through its partner,
Shri. Jai Gopal Dhal,
having its head office cum
registered office and recorded
postal address at 242,
Jaipur House, Agra – 282 010. ..... Applicant.

V/s.

1) Union of India,
through Resp. No.2.

2) Chief Engineer (Navy),
Naval Base Post,
through Commander Works Engineers
(Navy) Vasco-da-gama, Goa. .... Respondents.

Mr. S.G. Dessai, Senior Advocate with Mr. B.S. Dessai, Advocate for the applicant.

Mr. Joseph Vaz, Addl. Central Govt. Standing Counsel for the respondents.

CORAM : P.V. HARDAS, J.

Date : June 13, 2002.

ORAL ORDER :

This Civil Revision Application has been filed by the applicant being aggrieved by the order of the Civil Judge, Sr. Division, Mapusa dated 6.11.2001 on Civil Misc. Application No.295/97/Sr/I arising in Special Civil Suit No.97/97/Sr/I.

2. The respondents herein filed an application, Exhibit-8 under Section 41 of the Indian Arbitration Act,

1940 for appointment of Commissioner for taking sample of the soil for the purpose of testing. Special Civil Suit No.97/97 has been filed under Sections 30 and 33 of the Indian Arbitration Act, 1940 for setting aside the Award passed against the respondents herein. In the pending Special Civil Suit No.97/97, the respondents herein had filed the aforesaid application, Exhibit-8.

3. It is not necessary to refer to the merits or the various contentions which have been raised in Exhibit-8. However, it is suffice to mention here that the applicant herein had objected to the appointment of the Commissioner by filing their reply at Exhibit-10 and contending therein that after filing of the Award under Section 14 of the Arbitration Act, there was no scope for invoking the exercise of power under Section 41(b) of the Arbitration Act. In the said reply, it was also urged that resort to Section 41(b) of the Arbitration Act could be taken only in the event the arbitration proceedings were pending.

4. Before the learned trial Court, reliance was placed on the decision of the Apex Court in M/s. H.M. Kamaluddin Ansari & Co., v. Union of India and others (AIR 1984 SC 29), wherein the Apex Court has observed thus :

> " Under Section 41(b) the Court has been given power to issue interim injunction. But the Court has got power to pass an order of injunction only for the purpose of and in relation to arbitration proceedings before the Court. It cannot be said that as Clause (a) of Section 41 empowers the Court to pass interim injunction the Court can pass injunction even if the conditions of clause (b) of Section 41 were not satisfied. Such construction will render Clause (b) of Section 41 otiose."

5. In M/s. H.M. Kamaluddin Ansari & Co. v. Union of India and others (supra), the Supreme Court had held that an application under Section 33 challenging the validity of the arbitration clause was filed and along with it an application for injunction restraining the purchaser from withholding the payment under other contract was made to the contractor, was not the subject matter of the proceedings under Section 33, and the injunction prayed for could not be granted.

6. Mr. Dessai, the learned Senior Advocate appearing on behalf of the applicant has also relied on P.K. Thresia and others v. The Government of the State

of Kerala an another (AIR 1979 Kerala 212), in which it has been held :

> " In view of S.41 (b) and Item 4 in the Second Schedule, Civil Court is competent to grant interim injunction even when no proceedings are pending in Court provided arbitration has commenced and arbitration proceedings are pending before the arbitrator."

7. The learned trial Court while allowing the application at Exhibit-8 held that there was no specific bar which says that Section 41 (b) cannot be used after arbitration proceedings have concluded. Learned trial Court came to the conclusion "I am of the view, the mere fact that respondents are hiding behind the words goes to show that the appointment of the court commissioner to detect the fraud, is necessary". A plain reading of Section 41 (b) of the Arbitration Act, 1940 would show that the Court shall have the power for the purpose of and in relation to arbitration proceedings to pass necessary orders in respect of matters which are set out in second schedule. The power under Section 41 (b) of the Arbitration Act, can only be invoked during the

pendency of the arbitration proceedings. Section 41(b) cannot be invoked in proceedings filed to challenge the arbitration award.

8. The learned trial Judge while allowing the application Exhibit-8 has allowed the aforesaid application in utter disregard to the provisions of Section 41 (b) of Arbitration Act, 1940.

9. In view of this, the Civil Revision Application is allowed and the order dated 6.11.2001, appointing the Commissioner to take sample of the soil is, hereby, quashed and set aside.

The C.R.A. is allowed with no order as to costs.

P.V. HARDAS, J.

ssm.